

**NO. 02-18-00138-CR**

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**IN THE COURT OF APPEALS  
FOR THE SECOND DISTRICT OF TEXAS  
AT FORT WORTH**

FILED IN  
2<sup>nd</sup> COURT OF APPEALS  
FORT WORTH, TEXAS

9/9/2019 10:13:54 AM

DEBRA SPISAK  
Clerk

**CRYSTAL MASON,**

**Appellant,**

**V.**

**STATE OF TEXAS,**

**Appellee.**

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**On appeal from 432<sup>nd</sup> District Court  
Of Tarrant County, Texas  
In Cause No. 148710D**

**The Honorable Ruben Gonzalez, Jr. Presiding**

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**APPELLANT'S ORAL ARGUMENT HANDOUT**

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**NO. 02-18-00138-CR**

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**IN THE COURT OF APPEALS  
FOR THE SECOND DISTRICT OF TEXAS  
AT FORT WORTH**

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**CRYSTAL MASON,**  
**V.**  
**STATE OF TEXAS,**  
**Appellant,**  
**Appellee.**

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**TAB 1**

Vernon's Texas Statutes and Codes Annotated  
Election Code (Refs & Annos)  
Title 6. Conduct of Elections  
Chapter 64. Voting Procedures  
Subchapter A. Voting Generally

V.T.C.A., Election Code § 64.012

§ 64.012. Illegal Voting

Effective: December 1, 2017

Currentness

(a) A person commits an offense if the person:

- (1) votes or attempts to vote in an election in which the person knows the person is not eligible to vote;
- (2) knowingly votes or attempts to vote more than once in an election;
- (3) knowingly votes or attempts to vote a ballot belonging to another person, or by impersonating another person; or
- (4) knowingly marks or attempts to mark any portion of another person's ballot without the consent of that person, or without specific direction from that person how to mark the ballot.

(b) An offense under this section is a felony of the second degree unless the person is convicted of an attempt. In that case, the offense is a state jail felony.

**Credits**

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by [Acts 1997, 75th Leg., ch. 864, § 63, eff. Sept. 1, 1997](#); [Acts 2003, 78th Leg., ch. 393, § 3, eff. Sept. 1, 2003](#); [Acts 2011, 82nd Leg., ch. 123 \(S.B. 14\), § 16, eff. Jan. 1, 2012](#); [Acts 2017, 85th Leg., 1st C.S., ch. 1 \(S.B. 5\), § 1, eff. Dec. 1, 2017](#).

[Notes of Decisions \(25\)](#)

V. T. C. A., Election Code § 64.012, TX ELECTION § 64.012

Current through the end of the 2019 Regular Session of the 86th Legislature

**TAB 2**

Vernon's Texas Statutes and Codes Annotated  
Election Code (Refs & Annos)  
Title 6. Conduct of Elections  
Chapter 65. Counting Votes and Preparing Returns  
Subchapter A. Counting Votes Generally

V.T.C.A., Election Code § 65.010

§ 65.010. **Ballots Not Counted**

Effective: January 1, 2004

Currentness

(a) **The following ballots may not be counted:**

(1) a ballot that is not provided to the voter at the polling place;

(2) two or more ballots that are folded together in a manner indicating that they were folded together when deposited in the ballot box;

(3) a write-in envelope containing a write-in vote without an attached ballot;

(4) a ballot that has not been deposited in the ballot box used for the deposit of marked ballots; or

(5) **a provisional ballot that is not accepted** under Subchapter B.<sup>1</sup>

(b) If a ballot is unnumbered or the signature of the presiding judge does not appear on the back of a ballot, the presiding judge shall examine it to determine whether the ballot is not to be counted under Subsection (a)(1).

(c) If a ballot is not counted, an election officer shall indicate on the back of the ballot the reason for not counting it.

#### Credits

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by [Acts 1993, 73rd Leg., ch. 728, § 18, eff. Sept. 1, 1993](#); [Acts 1997, 75th Leg., ch. 1078, § 13, eff. Sept. 1, 1997](#); [Acts 2003, 78th Leg., ch. 1315, § 34, eff. Jan. 1, 2004](#).

#### Notes of Decisions (20)

#### Footnotes

<sup>1</sup> V.T.C.A., Election Code § 61.051 et seq.

**TAB 3**

Vernon's Texas Statutes and Codes Annotated  
Election Code (Refs & Annos)  
Title 6. Conduct of Elections  
Chapter 65. Counting Votes and Preparing Returns  
Subchapter B. Verification and Counting of Provisional Ballots

V.T.C.A., Election Code § 65.059

§ 65.059. Notice to Provisional Voter

Effective: January 1, 2004

Currentness

The secretary of state shall prescribe procedures to implement a system to allow a person who casts a provisional ballot under Section 63.011 to obtain access free of charge to information on the disposition of the person's ballot. The system:

- (1) must allow the person to determine whether the person's ballot was counted, and, if the person's ballot was not accepted, must indicate the reason why;
- (2) must provide the information only to the person who cast the provisional ballot; and
- (3) may involve the use of a toll-free telephone number or the Internet.

**Credits**

Added by [Acts 2003, 78th Leg., ch. 1315, § 35, eff. Jan. 1, 2004](#).

V. T. C. A., Election Code § 65.059, TX ELECTION § 65.059  
Current through the end of the 2019 Regular Session of the 86th Legislature

**TAB 4**

Vernon's Texas Statutes and Codes Annotated  
Election Code (Refs & Annos)  
Title 6. Conduct of Elections  
Chapter 65. Counting Votes and Preparing Returns  
Subchapter B. Verification and Counting of Provisional Ballots

V.T.C.A., Election Code § 65.056

§ 65.056. Disposition of Rejected Provisional Ballot

Effective: January 1, 2004

Currentness

(a) If the affidavit on the envelope of a rejected provisional ballot contains the information necessary to enable the person to register to vote under Chapter 13, the voter registrar shall make a copy of the affidavit under procedures prescribed by the secretary of state. The voter registrar shall treat the copy as an application for registration under Chapter 13.

(b) The early voting ballot board shall place the envelopes containing rejected provisional ballots in an envelope and shall seal the envelope. More than one envelope may be used if necessary.

(c) The envelope for the rejected provisional ballots must indicate the date and identity of the election, be labeled "rejected provisional ballots," and be signed by the board's presiding judge.

(d) A board member shall deliver the envelope containing the rejected provisional ballots to the general custodian of election records to be preserved for the period for preserving the precinct election records. The envelope may not be placed in the box containing the accepted provisional ballots.

**Credits**

Added by [Acts 2003, 78th Leg., ch. 1315, § 35, eff. Jan. 1, 2004](#).

V. T. C. A., Election Code § 65.056, TX ELECTION § 65.056

Current through the end of the 2019 Regular Session of the 86th Legislature

**TAB 5**



TARRANT COUNTY  
ELECTIONS ADMINISTRATION

STEPHEN VICKERS  
Elections Administrator

Deputy Elections Administrator

December 1, 2016

Idnumber: 40761380

Notice #: N7573975



CRYSTAL L MASON-HOBBS  
6065 AUTUMN BREEZE CIR  
FORT WORTH TX 76140

**Notice of Rejected Provisional Ballot**

This is to serve as notice that your ballot for the 11/08/2016 Election(s) was rejected by the ballot board and was not counted.

**Reason for Rejection:**

Not a registered voter or registration is not effective in time for this election.

For more information, please call 817-831-8683.

A handwritten signature of Stephen Vickers over a solid horizontal line.

Stephen Vickers  
Voter Registrar

CMIRANDA  
21977-1462 RNR

n\_rej\_2s  
120826

# TAB 6

Vernon's Texas Statutes and Codes Annotated

Election Code (Refs & Annos)

Title 1. Introductory Provisions

Chapter 2. Vote Required for Election to Office

Subchapter A. Election by Plurality

V.T.C.A., Election Code § 2.001

§ 2.001. Plurality Vote Required

**Currentness**

Except as otherwise provided by law, to be elected to a public office, a candidate must receive more votes than any other candidate for the office.

**Credits**

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

**Notes of Decisions (5)**

V. T. C. A., Election Code § 2.001, TX ELECTION § 2.001

Current through the end of the 2019 Regular Session of the 86th Legislature

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# TAB 7

Vernon's Texas Statutes and Codes Annotated

Election Code (Refs & Annos)

Title 1. Introductory Provisions

Chapter 2. Vote Required for Election to Office

Subchapter A. Election by Plurality

V.T.C.A., Election Code § 2.002

§ 2.002. Tie Vote

Effective: September 1, 2019

Currentness

(a) Except as provided by Subsection (f), (g), or (i), in an election requiring a plurality vote, if two or more candidates for the same office tie for the number of votes required to be elected, a second election to fill the office shall be held.

(b) Not later than the fifth day after the date the automatic recount required by Subsection (i) is completed or the final canvass following the automatic recount is completed, if applicable, the authority responsible for ordering the first election shall order the second election. The second election shall be held not earlier than the 20th day or later than the 30th day after the date the automatic recount required by Subsection (i) is completed or the final canvass following the automatic recount is completed, if applicable.

(c) The names of the tying candidates only shall be printed on the ballot for the second election. Write-in votes are not permitted. If either of the candidates is a party nominee, the title of the office shall be listed on the ballot in a vertical column with the name of each candidate listed below the office title with each candidate's political party alignment next to the name.

(d) The order of the candidates' names on the ballot shall be the relative order of names on the original ballot .

(e) Notice of the second election shall be given in accordance with Chapter 4 except that a notice under [Section 4.003\(a\)\(2\)](#) or [\(b\)](#) must be posted not later than the 15th day before election day.

(f) The tying candidates may agree to cast lots to resolve the tie. The agreement must be filed with the authority responsible for ordering the election. That authority or, if the authority is a body, the body's presiding officer, shall supervise the casting of lots.

(g) A tying candidate may resolve the tie by filing with the authority described by Subsection (f) a written statement of withdrawal signed and acknowledged by the candidate. On receipt of the statement of withdrawal, the remaining candidate is the winner, and a second election or casting of lots is not held.

(h) This section does not apply to elective offices of the executive department specified by [Article IV, Section 1, of the Texas Constitution](#).

**TAB 8**

Vernon's Texas Statutes and Codes Annotated  
Election Code (Refs & Annos)  
Title 1. Introductory Provisions  
Chapter 2. Vote Required for Election to Office  
Subchapter B. Runoff Election (Refs & Annos)

V.T.C.A., Election Code § 2.021

§ 2.021. Runoff Election Required

**Currentness**

If no candidate for a particular office receives the vote necessary to be elected in an election requiring a majority **vote**, a runoff election for that office is required.

**Credits**

Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

**Notes of Decisions (2)**

V. T. C. A., Election Code § 2.021, TX ELECTION § 2.021

Current through the end of the 2019 Regular Session of the 86th Legislature

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**TAB 9**

United States Code Annotated

Title 52. Voting and Elections (Refs & Annos)

Subtitle II. Voting Assistance and Election Administration

Chapter 209. Election Administration Improvement

Subchapter III. Uniform and Nondiscriminatory Election Technology and Administration

Requirements

Part A. Requirements

52 U.S.C.A. § 21082

Formerly cited as 42 USCA § 15482

§ 21082. Provisional voting and voting information requirements

Currentness

**(a) Provisional voting requirements**

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

**(1)** An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

**(2)** The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--

**(A)** a registered voter in the jurisdiction in which the individual desires to vote; and

**(B)** eligible to vote in that election.

**(3)** An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

**(4)** If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

**(5)(A)** At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under

the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

**(B)** The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

States described in section 20503(b) of this title may meet the requirements of this subsection using voter registration procedures established under applicable State law. The appropriate State or local official shall establish and maintain reasonable procedures necessary to protect the security, confidentiality, and integrity of personal information collected, stored, or otherwise used by the free access system established under paragraph (5)(B). Access to information about an individual provisional ballot shall be restricted to the individual who cast the ballot.

**(b) Voting information requirements**

**(1) Public posting on election day**

The appropriate State or local election official shall cause voting information to be publicly posted at each polling place on the day of each election for Federal office.

**(2) Voting information defined**

In this section, the term “voting information” means--

**(A)** a sample version of the ballot that will be used for that election;

**(B)** information regarding the date of the election and the hours during which polling places will be open;

**(C)** instructions on how to vote, including how to cast a vote and how to cast a provisional ballot;

**(D)** instructions for mail-in registrants and first-time voters under section 21083(b) of this title;

**(E)** general information on voting rights under applicable Federal and State laws, including information on the right of an individual to cast a provisional ballot and instructions on how to contact the appropriate officials if these rights are alleged to have been violated; and

**(F)** general information on Federal and State laws regarding prohibitions on acts of fraud and misrepresentation.

**(c) Voters who vote after the polls close**

Any individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.

**(d) Effective date for provisional voting and voting information**

Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2004.

**CREDIT(S)**

([Pub.L. 107-252, Title III, § 302](#), Oct. 29, 2002, 116 Stat. 1706.)

**Notes of Decisions (18)**

52 U.S.C.A. § 21082, 52 USCA § 21082

Current through P.L. 116-56.

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**TAB 10**

Vernon's Texas Statutes and Codes Annotated  
Code of Criminal Procedure (Refs & Annos)  
Title 1. Code of Criminal Procedure of 1965  
Proceedings After Verdict  
Chapter 42A. Community Supervision (Refs & Annos)  
Subchapter L. State Jail Felony Community Supervision

Vernon's Ann.Texas C.C.P. Art. 42A.551

Art. 42A.551. Placement on Community Supervision; Execution of Sentence

Effective: September 1, 2019  
Currentness

(a) Except as otherwise provided by Subsection (b) or (c), on conviction of a state jail felony under [Section 481.115\(b\)](#), [481.1151\(b\)\(1\)](#), [481.116\(b\)](#), [481.1161\(b\)\(3\)](#), [481.121\(b\)\(3\)](#), or [481.129\(g\)\(1\)](#), [Health and Safety Code](#), that is punished under [Section 12.35\(a\)](#), [Penal Code](#), the judge shall suspend the imposition of the sentence and place the defendant on community supervision.

(b) If the defendant has been previously convicted of a felony, other than a felony punished under [Section 12.44\(a\)](#), [Penal Code](#), or if the conviction resulted from an adjudication of the guilt of a defendant previously placed on deferred adjudication community supervision for the offense, the judge may:

(1) suspend the imposition of the sentence and place the defendant on community supervision; or

(2) order the sentence to be executed.

(c) Subsection (a) does not apply to a defendant who:

(1) under [Section 481.1151\(b\)\(1\)](#), [Health and Safety Code](#), possessed more than five abuse units of the controlled substance;

(2) under [Section 481.1161\(b\)\(3\)](#), [Health and Safety Code](#), possessed more than one pound, by aggregate weight, including adulterants or dilutants, of the controlled substance; or

(3) under [Section 481.121\(b\)\(3\)](#), [Health and Safety Code](#), possessed more than one pound of marihuana.

(d) On conviction of a state jail felony punished under [Section 12.35\(a\)](#), [Penal Code](#), other than a state jail felony listed in Subsection (a) or to which [Article 42A.515](#) applies, subject to Subsection (e), the judge may:

(1) suspend the imposition of the sentence and place the defendant on community supervision; or

(2) order the sentence to be executed:

(A) in whole; or

(B) in part, with a period of community supervision to begin immediately on release of the defendant from confinement.

(e) In any case in which the jury assesses punishment, the judge must follow the recommendations of the jury in suspending the imposition of a sentence or ordering a sentence to be executed. If a jury assessing punishment does not recommend community supervision, the judge must order the sentence to be executed in whole.

(f) A defendant is considered to be finally convicted if the judge orders the sentence to be executed under Subsection (d)(2), regardless of whether the judge orders the sentence to be executed in whole or only in part.

(g) The judge may suspend in whole or in part the imposition of any fine imposed on conviction.

#### Credits

Added by [Acts 2015, 84th Leg., ch. 770 \(H.B. 2299\), § 1.01, eff. Jan. 1, 2017](#). Amended by [Acts 2019, 86th Leg., ch. 413 \(S.B. 20\), § 2.02, eff. Sept. 1, 2019](#).

#### Notes of Decisions (3)

Vernon's Ann. Texas C. C. P. Art. 42A.551, TX CRIM PRO Art. 42A.551

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TAB 11

Vernon's Texas Statutes and Codes Annotated  
Government Code (Refs & Annos)  
Title 4. Executive Branch (Refs & Annos)  
Subtitle G. Corrections  
Chapter 508. Parole and Mandatory Supervision (Refs & Annos)  
Subchapter A. General Provisions

V.T.C.A., Government Code § 508.001

§ 508.001. Definitions

Effective: January 11, 2004  
[Currentness](#)

In this chapter:

- (1) "Board" means the Board of Pardons and Paroles.
- (2) "Community supervision and corrections department" means a department established under Chapter 76.
- (3) "Director" means the director of the pardons and paroles division.
- (4) "Division" means the pardons and paroles division.
- (5) "Mandatory supervision" means the release of an eligible inmate sentenced to the institutional division so that the inmate may serve the remainder of the inmate's sentence not on parole but under the supervision of the pardons and paroles division.
- (6) "Parole" means the discretionary and conditional release of an eligible inmate sentenced to the institutional division so that the inmate may serve the remainder of the inmate's sentence under the supervision of the pardons and paroles division.
- (7) "Parole officer" means a person appointed by the director and assigned the duties of assessment of risks and needs, investigation, case management, and supervision of releasees to ensure that releasees are complying with the conditions of parole or mandatory supervision.
- (8) "Parole commissioner" means a person employed by the board to perform the duties described by [Section 508.0441](#).
- (9) "Releasee" means a person released on parole or to mandatory supervision.
- (10) "Presiding officer" means the presiding officer of the Board of Pardons and Paroles.

**TAB 12**

Vernon's Texas Statutes and Codes Annotated  
Constitution of the State of Texas 1876 (Refs & Annos)  
Article IV. Executive Department

Vernon's Ann.Texas Const. Art. 4, § 11A

§ 11A. Suspension of sentence and probation

**Currentness**

Sec. 11A. The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe.

**Credits**

Adopted Aug. 24, 1935.

**Editors' Notes**

**INTERPRETIVE COMMENTARY**

**2007 Main Volume**

Prior to the adoption of this amendment, legislation permitting the courts to suspend pronouncement of sentence had been upheld as constitutional. This law provided that the jury, after hearing evidence, could determine whether the accused was or was not such a person as should be confined within the penitentiary. If the jury found that the best interests of the accused and of the state would be served by compelling him to undergo no punishment then the jury was empowered to so provide in its verdict.

It was held that this legislation did not conflict with the exclusive pardoning power of the governor in that it did not relieve from punishment after conviction, but was simply a general provision to provide that in a certain character of cases, no punishment should be assessed unless the person on trial should once again violate the law.

Moreover it was asserted that this legislation related only to the fixing of penalties and punishment, a legislative power, and merely provided that in certain cases no punishment should be fixed. See *Baker v. State*, 70 Cr.R. 618, 158 S.W. 998 (1913).

Nevertheless, an earlier statute which authorized the trial court to suspend the execution of the sentence and also to set aside and annul the former judgment was held invalid on several grounds, one of which was that it infringed the pardoning power of the governor. See *Snodgrass v. State*, 67 Cr.R. 615, 150 S.W. 162 (1912).

To remove all doubt, Section 11A was adopted in 1935 which gives to the courts the clear power to suspend not only the imposition of sentence, but also the execution of sentence, to place the defendant on probation, and to reimpose such sentence, all under conditions prescribed by the legislature. In compliance with this authority, the legislature enacted the Adult Probation and Parole Law, Vernon's Ann.C.C.P. art. 781b.

The purpose of permitting suspension or imposition of sentences is to mitigate the penalties of the criminal law so far as the public interest will permit, and to aid in the reformation of a criminal so that he can take his place in society. Thus, it is thought that the welfare of the state and society will be better served.

[Notes of Decisions \(26\)](#)

Vernon's Ann. Texas Const. Art. 4, § 11A, TX CONST Art. 4, § 11A

Current through the end of the 2019 Regular Session of the 86th Legislature

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**TAB 13**

369 F.3d 847  
United States Court of Appeals,  
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

William Allen FERGUSON, Defendant–Appellant.

No. 03–20365.

|

May 7, 2004.

### Synopsis

**Background:** Defendant sought to vacate sentence imposed by the United States District Court for the Southern District of Texas, [Lynn N. Hughes](#), J., for violating a condition of his supervised release.

**Holdings:** The Court of Appeals held that:

court erred by imposing a term of incarceration and subsequent term of home detention during supervised release which combined to exceed the maximum statutory term for defendant's violation;

court did not abuse its discretion by ordering the specific condition of supervised release that defendant not use cough syrups with codeine or sleeping potions with drugs and alcohol without a prescription during his term of supervised release;

court erred by barring defendant from using tobacco products and aspirin during his term of supervised release; and

condition of supervised release completely barring use of all over-the-counter (OTC) medications without a prescription constituted an abuse of court's discretion.

Vacated and remanded.

### Attorneys and Law Firms

\*[848 Paula Camille Offenhauser](#) and [James Lee Turner](#),  
Asst. U.S. Atty., Houston, TX, for Plaintiff–Appellee.

[Roland E. Dahlin, II](#), Fed. Pub. Def., Margaret Christina Ling, Asst. Fed. Pub. Def., [Michael L. Herman](#), Houston, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before [HIGGINBOTHAM](#), [DENNIS](#) and [CLEMENT](#), Circuit Judges.

### Opinion

PER CURIAM:

William Ferguson seeks to vacate his sentence imposed for violating a condition of his supervised release. Specifically, he asserts that his twenty-three-month term of incarceration and subsequent six-month term of home detention during supervised release combine to exceed the maximum statutory term for his violation. He further asserts that the court erroneously conditioned his supervised release on his abstention from tobacco products and over-the-counter medications without a prescription. We VACATE in part and REMAND for resentencing.

### I

In July 1999, Appellant William Ferguson pleaded guilty to possession of a machine gun in violation of [18 U.S.C. § 922\(o\)](#). The district court sentenced Ferguson to thirty-six months' incarceration and three years of supervised release.

In October 2002, the United States Probation Office filed a petition to revoke Ferguson's supervised release, alleging six violations, and Ferguson pleaded true to five of the six allegations. The district court sentenced Ferguson to twenty-three months of incarceration pursuant to \*[849 § 3583\(e\)\(3\)](#) and thirteen months of supervised release under [§ 3583\(h\)](#). The court ordered Ferguson's first six months of supervised release to be served in home detention, and subjected the entire term of supervised release to the conditions that he "not smoke, use snuff, or drink alcohol," and that he "take no patent medicines without a prescription, and nothing stronger in terms of caffeine, a cup of coffee or Coca Cola." Further, the court ordered that Ferguson must obtain a prescription to take "[a]spirin and [cough syrup with codeine](#)," and "[NyQuil](#) or sleeping potions with drugs and alcohol in them."

On appeal, Ferguson challenges the six-months' home detention imposed in addition to the twenty-three months of incarceration,<sup>1</sup> and he contends that the court erred by barring him from using tobacco products and OTC medications without a prescription during his supervised release.<sup>2</sup>

## II

### A

A defendant's failure to contemporaneously object to an alleged error generally results in plain error review.<sup>3</sup> However, we review de novo a sentence that allegedly exceeds the statutory maximum term.<sup>4</sup>

[Section 3583 of Title 18](#) governs the imposition, modification, or revocation of a term of supervised release.<sup>5</sup> [Section 3583](#) provides that when sentencing a defendant to a term of incarceration, a court may include a term of supervised release to follow imprisonment.<sup>6</sup> The court may impose conditions on the defendant's term of supervised release.<sup>7</sup> In addition to certain mandatory conditions, [§ 3583\(d\)](#) provides that a court may impose "any condition set forth as a discretionary condition of probation in [section 3563\(b\)\(1\)](#) through [\(b\)\(10\)](#) and [\(b\)\(12\)](#) through [\(b\)\(20\)](#), and any other condition it considers to be appropriate."<sup>8</sup> [Section 3563\(b\)\(19\)](#) governs home detention, providing that a court may require a defendant to "remain at his place of residence during nonworking hours ..., except that a condition under this paragraph may be imposed only as an alternative to incarceration."<sup>9</sup> Similarly, the [Sentencing Guidelines](#) allow home detention only as an alternative to incarceration.<sup>10</sup>

If a court finds that a prisoner violated a condition of his supervised release, the court may revoke the supervised release and "require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release."<sup>11</sup> However, when the offense that resulted in the term of supervised release is a Class C felony, as it was in this case, two years is the maximum term of incarceration.<sup>12</sup> Alternatively, a court may impose home detention "except

that an order [of home detention] may be imposed only as an alternative to incarceration."<sup>13</sup>

In addition to imposing a term of incarceration in response to a defendant's supervised release violation, a court may reimpose a term of supervised release when the defendant "is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3)."<sup>14</sup> The reimposed term "shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release."<sup>15</sup>

### B

Ferguson contends that after sentencing him to twenty-three months' incarceration, the court could only sentence him to one-month of home detention without violating the two-year statutory maximum term. He bases this argument on the plain language of [§ 3583](#). The government reads the statutory language differently. It claims that "[i]nterpreting [section 3563\(b\)\(19\)](#) [home detention allowable as an alternative to incarceration] to mean that home detention may only be ordered as a substitute to incarceration makes no sense in the context of [section 3563\(b\)](#) and [section 3583\(d\)](#)." It would make no sense, according to the government, because a defendant is not in prison when probationary conditions are imposed under [§ 3563](#); therefore, "as an alternative to incarceration" must refer to subsections (b) (10) [intermittent custody by the Bureau of Prisons] and (b)(11) [confinement at community corrections facility]. Alternatively, the government asserts that the catchall provision of discretionary conditions could justify the court's order of home detention.

Given the language and interplay of [§ 3583](#) and [§ 3563](#), Ferguson's argument is more faithful to the plain meaning of the applicable statutory provisions. The statutory framework governing revocation and punishment for violating a condition of supervised release—[§ 3583\(e\)](#)—alone implies that incarceration and home detention are alternative punishments that may not combine in excess of the maximum statutory term of incarceration. When a defendant violates a condition of his supervised release, a court may choose to (1) impose the maximum sentence of incarceration allowed under [§ 3583\(e\)\(3\)](#); (2) order home

detention “as an alternative to incarceration” under § 3583(e)(4); or (3) order an incarceration term less than the maximum allowable term and reimpose a term of \*851 supervised release under § 3583(h). Sections 3583(e)(3) and (e)(4) make clear that incarceration and home detention are mutually exclusive when a court imposes the maximum sentence of incarceration; a court could not impose the maximum term of incarceration under subsection (e)(3) and also impose a period of home detention under (e)(4).<sup>16</sup> The government does not explain why the same limitation would not hold true when a court imposes a partial sentence of incarceration.

The court's power to order home detention as a condition of supervised release stems from § 3583(d), which in turn refers to § 3563(b)(19). Sections 3563(b)(19) and 3583(e)(4), however, indicate that unlike other discretionary conditions, home detention is unique. Subsection (b)(19) specifically states that home detention may be imposed “only as an alternative to incarceration.” It is well-settled that “we should give the words of statutes their plain meaning.”<sup>17</sup> Webster's Third New International Dictionary defines “alternative” as “a proposition or situation offering a choice between two things wherein if one thing is chosen the other is rejected.”<sup>18</sup> Accordingly, the plain meaning of “alternative” leads to the conclusion that a court could not impose both a term of incarceration (upon revocation of supervised release) and subsequent home detention during a reimposed term of supervised release that, when combined, exceeds the allowable maximum incarceration term.<sup>19</sup>

The government asks us to read the word “incarceration” in two very different ways depending on which section is at issue. The government concedes that § 3583(e)(4) provides home detention as an alternative to incarceration. But it asserts that home detention “as an alternative to incarceration” as a discretionary condition to supervised release under §§ 3583(d) and 3563(b)(19) refers to intermittent detention and community correction facilities.

This argument fails to persuade for various reasons. First, it distorts the statutory language. If Congress intended to prohibit courts from aggregating intermittent detention under (b)(10) and residence at community correction facilities under (b)(11) with home detention under (b)(19), it could have chosen much clearer language to do so. Instead of stating that home detention could be imposed only as an alternative to detention, Congress could have provided that home detention could not be ordered concurrently with conditions (b)(10) and

(b)(11). Second, it is unclear why intermittent detention and residence at a community correction facility would qualify as “incarceration.” Finally, the government cites no authority in support of its position, and even if its interpretation of § 3583 were as rational as Ferguson's interpretation, we may \*852 “choose the harsher result [the government's result, in this case] only when the legislature has spoken in clear and definite language.”<sup>20</sup> The language at issue here does not clearly and definitely provide that a court may combine the term of incarceration and home detention in excess of the maximum term allowed by § 3583(e)(3). Accordingly, we may not choose the harsher result.

Considering the plain statutory language, and the lack of authority compelling us to avoid its plain meaning, the court erred by imposing a term of incarceration as well as a term of home detention that combine to exceed the maximum statutory term of incarceration.

### III

We now turn to the district court's order barring Ferguson from using tobacco products and OTC medications without a prescription as conditions of supervised release.

#### A

When ordering a term of supervised release, certain conditions are mandatory under § 3583(d) and § 5D1.3(b) of the Sentencing Guidelines.<sup>21</sup> Additionally, there is an array of discretionary conditions that a court may impose.<sup>22</sup> Although a court has broad discretion in determining which conditions to impose, the conditions must meet statutory criteria:

First, special conditions of supervised release must be reasonably related to the factors set forth in § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). These factors include: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant,” (2) the need “to afford adequate deterrence to criminal conduct,” (3) the need “to protect the public from further crimes of the defendant,” and (4) the need “to provide the defendant with needed [training], medical care, or other correctional treatment in the most effective manner.”<sup>23</sup>

Even if these criteria are satisfied, the court may not impose conditions that “involve a greater deprivation of liberty than is reasonably necessary to achieve the latter three statutory goals.”<sup>24</sup> Finally, the conditions must be “consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).”<sup>25</sup>

We review a court's imposition of discretionary conditions for an abuse of discretion.<sup>26</sup> Examples of a court abusing its discretion by imposing conditions that are overbroad or not reasonably related to the offense or characteristics of the defendant include (1) prohibiting a defendant from possessing a firearm during probation when the underlying offense was negligent \*853 discharge of a pollutant and the defendant had no history of violence;<sup>27</sup> (2) requiring a defendant to allow access to all financial information to his probation officer when only certain years of tax evasion were at issue,<sup>28</sup> and (3) requiring a defendant guilty of mail fraud and altering odometers to sell his car business when barring his participation in the business during the supervised release was sufficient to protect the public.<sup>29</sup>

## B

In support of the court's conditions that Ferguson not use tobacco products, ingest any OTC medications, including aspirin, and not take cough syrups with codeine, NyQuil, or sleeping potions with drugs and alcohol without a prescription, the court pointed to Ferguson's history of drug abuse. The court found that Ferguson “is dependent on external stimulation,” and has “demonstrated that he is likely to hurt people while he's being externally stimulated.”

The district court did not abuse its discretion by ordering the specific condition that Ferguson not use cough syrups with codeine, NyQuil, or sleeping potions with drugs and alcohol without a prescription during his term of supervised release. These medications contain chemicals that may be addictive. Considering Ferguson's history with drug abuse, the court acted within its discretion by requiring prescriptions for these particular medications.

The government does not argue that the conditions regarding tobacco and aspirin are reasonably related to the nature and circumstances of the offense and history and characteristics of the defendant, or that they involve no greater deprivation of liberty than reasonably necessary for deterrence, public

safety, or medical care of the defendant. We find that the use of tobacco and aspirin are not reasonably related to Ferguson's violation for possessing a machine gun. Moreover, given that there is no evidence that tobacco and aspirin cause any violent or illegal conduct in Ferguson, the conditions are not necessary for deterrence, public safety, or medical care.

Regarding the condition that Ferguson not take any OTC medication, Ferguson asserts that (1) the separate and unchallenged conditions that he not unlawfully use controlled substances and that he refrain from excessive use of alcohol sufficiently address his conceded alcohol and drug problems; (2) the OTC condition is not reasonably related to his offense or history because there is no evidence that he has abused OTC medications; and (3) the condition involves a greater deprivation of liberty than is reasonably necessary to afford adequate deterrence to criminal conduct and to protect the public. In response, the government asserts that the condition is valid in light of Ferguson's drug and alcohol abuse because “[s]ome patent medicines contain precursor chemicals in user quantities.” As an example, the government notes that some cold, sinus, and allergy medications contain a “precursor for the manufacture of methamphetamine.”

Given the complete bar to all OTC medications, the separate conditions barring Ferguson from abusing alcohol and using illegal drugs, and the district court's \*854 failure to limit the condition in any way, the court abused its discretion. There may very well be certain OTC medications that contain chemicals capable of abuse that could have a detrimental impact on Ferguson. There is no indication that the district court made any finding on which medicines were particularly troublesome other than the ones specifically mentioned. As the condition stands now, Ferguson may not use any OTC medication. With the breadth of the condition in mind, it is clear that the condition is not reasonably related to his offense or history, and it involves a greater deprivation of liberty than is reasonably necessary to deter criminal conduct and to protect the public.<sup>30</sup>

## IV

For these reasons, we VACATE the sentence and REMAND for resentencing. We VACATE the conditions of Ferguson's supervised release that he not use tobacco products or ingest any OTC medications, but affirm the condition that Ferguson not use cough syrups with codeine, NyQuil, or sleeping potions with drugs and alcohol without a prescription.

**All Citations**

369 F.3d 847

**Footnotes**

- 1    18 U.S.C. § 3583(e)(3) sets two years as the maximum statutory term of incarceration for violating a condition of supervised release resulting from a Class C felony. There is no dispute that Ferguson's underlying offense was a Class C felony.
- 2    Ferguson did not object to the term of his incarceration, the term of his supervised release, or to the requirement that his first six months of supervised release be served in home detention. He did, however, object to the conditions that he not smoke or use OTC medications without a prescription. The day after the sentencing hearing, Ferguson filed a Motion to Correct Clear Error pursuant to Rule 35(a) of the Federal Rules of Criminal Procedure, asserting that the six-month term of home detention was improper. The district court denied that motion.
- 3    See, e.g., *United States v. Mann*, 161 F.3d 840, 867 n. 91 (5th Cir.1998).
- 4    *United States v. Sias*, 227 F.3d 244, 246 (5th Cir.2000) (explaining that "because a sentence which exceeds the statutory maximum is an illegal sentence and therefore constitutes plain error, our review of the issue presented in this appeal will be de novo").
- 5    Supervised release is different than probation: "probation is imposed instead of imprisonment, while supervised release is imposed after imprisonment." *United States v. Perez-Macias*, 335 F.3d 421, 427 n. 13 (5th Cir.2003).
- 6    18 U.S.C. § 3583(a).
- 7    18 U.S.C. § 3583(d).
- 8    *Id.*
- 9    18 U.S.C. § 3563(b)(19).
- 10    U.S. SENTENCING GUIDELINES MANUAL §§ 5D1.3(e)(2), 5F1.2.
- 11    18 U.S.C. § 3583(e)(3).
- 12    *Id.*
- 13    18 U.S.C. § 3583(e)(4).
- 14    18 U.S.C. § 3583(h).
- 15    *Id.*
- 16    See *United States v. Leaphart*, 98 F.3d 41, 43 (2d Cir.1996).
- 17    *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 502 (5th Cir.2002).
- 18    WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 63 (1961).
- 19    Although there is no case that disposes of the issue, the Second Circuit has explained that a sentence of incarceration and term of home detention are mutually exclusive. *Leaphart*, 98 F.3d at 43 ("Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment. Here, the Magistrate Judge decided to sentence Leaphart to the maximum possible term of imprisonment. Having made that decision, she could not also sentence him to home detention. Accordingly, Leaphart is not subject to any form of home detention during his term of supervised release.") (internal citations omitted). Although *Leaphart* dealt with home detention as imposed through the Sentencing Guidelines, the same language appears in § 3583, and the same reasoning applies to this case.
- 20    *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971).
- 21    Mandatory conditions include, for example, not committing another federal, state, or local offense, and not unlawfully possessing a controlled substance. See 18 U.S.C. § 3583(d); see also U.S. SENTENCING GUIDELINES MANUAL §§ 5D1.3(a).
- 22    18 U.S.C. § 3583(d).
- 23    *United States v. Paul*, 274 F.3d 155, 164–65 (5th Cir.2001) (quoting 18 U.S.C. § 3553(a)(1)-(2) (1994), as included in § 3583(d)). These criteria have been incorporated into the Sentencing Guidelines as well. See U.S. SENTENCING GUIDELINES MANUAL §§ 5D1.3(b).
- 24    *Paul*, 274 F.3d at 165.
- 25    18 U.S.C. § 3583(d).
- 26    *Paul*, 274 F.3d at 165.

- 27     *United States v. Voda*, 994 F.2d 149, 153–54 (5th Cir.1993).  
28     *United States v. Stafford*, 983 F.2d 25, 28–29 (5th Cir.1993).  
29     *United States v. Mills*, 959 F.2d 516, 519–20 (5th Cir.1992).  
30     See *Voda*, 994 F.2d at 153–54; *Mills*, 959 F.2d at 519–20.

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**TAB 14**

AW7-15-53, 9/13

Prescribed by Secretary of State  
Sec. 63.011, Election Code

|   |   |
|---|---|
| Type of Election (Tipo de Elección)   | Date of Election (Fecha de la Elección)   |
| Authority Conducting Election (Autoridad Administrando la Elección)   | Precinct No. where voted<br>(Número de Precinto-donde voto)   |
| Precinct No. where registered (Número de Precinto-donde está registrado)  | Ballot Code from the Voter<br>Provisional Stub (Código de la boleta del Talón del Voto Provisional) |
| <b>TO BE COMPLETED BY VOTER: (PARA QUE EL VOTANTE LO LLENE:)</b><br><p>I am a registered voter of this political subdivision and in the precinct in which I'm attempting to vote and have not already voted in this election (either in person or by mail). I am a resident of this political subdivision, have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned. I have not been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote. I understand that giving false information under oath is a misdemeanor, and I understand that it is a felony of the 2<sup>nd</sup> degree to vote in an election for which I know I am not eligible.</p> <p>Estoy inscrito como votante en esta subdivisión política y en el precinto en el cual estoy intentando votar y aun no he votado en esta elección (en persona o por correo). Soy residente de esta subdivisión política, no he sido definitivamente condenado de algún delito mayor o si soy un delincuente he cumplido toda mi condena inclusive el periodo de encarcelamiento, libertad condicional, libertad supervisada o he sido indultado. No me han determinado por un juicio final de un tribunal ejerciendo jurisdicción de un testamento ser totalmente incapacitado mentalmente o parcialmente incapacitado sin el derecho de votar. Entiendo que dar información falsa bajo juramento es un delito menor y también entiendo que es un delito mayor de segundo grado votar en una elección sabiendo que no cumple con los requisitos necesarios.</p> |   |



STATE'S EXHIBIT  3-22-18 A1

# Notice

## To Be Removed by Voter Registrar Only

### Affidavit of Provisional Voter (Declaración Jurada de Votante Provisional)

|                      |                            |  |                               |
|----------------------|----------------------------|--|-------------------------------|
| Last Name (Apellido) | First Name (Primer nombre) | Middle Name (If any) (Segundo nombre) (si tiene) | Former Name (Nombre anterior) |
|----------------------|----------------------------|--|-------------------------------|

Residence Address: Street Address and Apartment Number, City, State, and Zip. If none, describe where you live (Do not include PO Box, Rural Rt. Or Business Address) (Domicilio: calle y numero de apartamento, Ciudad, Estado, y Código Postal: A falta de estos datos, describa donde vive) (No incluya el apartado de correos, ruta rural, o dirección comercial.)

Mailing Address: City, State, and Zip. If mail cannot be delivered to your residence address. (Dirección postal, Ciudad, Estado y Código Postal) (si es imposible entregarle correspondencia a domicilio)

|   |                                    |   |  |
|---|------------------------------------|---|--|
| Date of Birth: Month/Day/Year<br>(Fecha de nacimiento): (Mes/Día/Año) | Gender: (Optional) (sexo) Opcional | <input type="checkbox"/> Male (Masculino) | <input type="checkbox"/> Female (Femenino) |
|---|------------------------------------|---|--|

TX Driver's License No. or Personal I.D. No. (Issued by TX Dept of Public Safety) (Número de su licencia de conducir o de su Cédula de Identidad expedida por el Departamento de Seguridad Pública de Texas)

|                          |                          |                          |                          |                          |                          |                          |                          |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <input type="checkbox"/> |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|

Social Security No. (last 4 digits required if you do not have a driver's license or I.D. number) Número de Seguro social (si no tiene licencia de conducir o identificación personal se requiere los 4 últimos dígitos de su número de seguro social)

|         |                          |                          |                          |                          |
|---------|--------------------------|--------------------------|--------------------------|--------------------------|
| XXX-XX- | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
|---------|--------------------------|--------------------------|--------------------------|--------------------------|

I have not been issued a TX driver's license/personal identification number or Social Security Number.  
Yo no tengo una licencia de conducir, Cédula de identidad personal de Texas ni un número de Seguro Social.

|   |                              |                             |   |
|---|------------------------------|-----------------------------|---|
| Check appropriate box: ARE YOU A UNITED STATES CITIZEN?<br>(Marque el cuadro apropiado: Es usted ciudadano/a de los Estados Unidos) | YES <input type="checkbox"/> | NO <input type="checkbox"/> | Signature of Voter: (Firma del votante) |
|   | (si)                         | (no)                        | X _____                                 |

**TAB 15**

## **TESTIMONY ON READING PROVISIONAL BALLOT AFFIDAVIT**

### **TESTIMONY ON RIGHT HAND SIDE**

**Ms. Mason: RR 2 123: 14-18**

14 Q. (BY MR. ST. JOHN) Were you given instructions  
15 to make sure that you filled out everything correctly?  
16 A. Yes. That's what -- that's what we were doing  
17 on this right side. She -- everything matched my  
18 driver's license. That's what it needed to do. And

### **TESTIMONY ON LEFT HAND SIDE**

**Ms. Mason: RR 2 122:19-22**

19 Spanish for it. Did you read this warning, notice,  
20 admonishment, about if you're a convicted felon, you  
21 can't vote?  
22 A. I didn't, sir.

**Mr. Dietrich: RR 2 86:24-87:2**

23 Q. (BY MR. ST. JOHN) I'm not picking on you.  
24 You cannot tell District Judge Gonzalez  
25 that she, in fact, read the left-hand side of this  
  
1 ballot. You can't say that, can you?  
2 A. No.

### **TESTIMONY THAT IS NOT SPECIFIC TO EITHER SIDE OF THE BALLOT**

**Mr. Streibich: RR 2 102 18-20**

18 Q. Did you see if Ms. Mason-Hobbs read that  
19 provisional ballot affidavit?  
20 A. Yes, sir.

TAB 16

AFFIDAVIT IN ANY FACT

BEFORE ME, Angela Barnes, on this day personally appeared Jocanna Jones who being by me first duly sworn, on oath deposes and says that I am competent and qualified to make the affidavit and I have personal knowledge of the fact stated herein and they are true and correct:

Hello my name is Jocanna Jones, I went to vote with my aunt Crystal. I was not registered to vote at the time because on my id i did not have my address updated with my rendon address nor was i aware that i had not been eligible so i didnt fill out a Provisional ballot. My aunt Crystal, on the other hand believed that she WAS eligible to vote, so she filled out a Provisional ballot. I firmly believe that my aunt Crystal thought she was eligible to vote and if she did not believe that she was

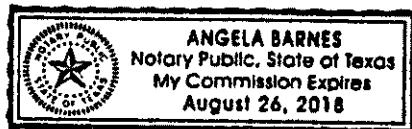
I HAVE PERSONAL KNOWLEDGE OF THE ABOVE AND I SWEAR THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT.

Jocanna Jones

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF

April 2018



NOTARY PUBLIC  
In and for the State of Texas

## AFFIDAVIT IN ANY FACT

BEFORE ME, Angela Barnes on this day personally appeared Jocanna Jones who being by me first duly sworn, on oath deposes and says that I am competent and qualified to make the affidavit and I have personal knowledge of the fact stated herein and they are true and correct:

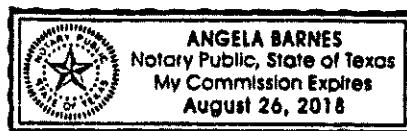
Eligible to vote. She would not have cast a Provisional ballot. Just like me.  
Neither on the way to the Polling place  
nor on the way back did my aunt  
express any concern about whether she  
was actually eligible to vote.

I HAVE PERSONAL KNOWLEDGE OF THE ABOVE AND I SWEAR THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT.

Jocanna Jones

AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF April 2018



NOTARY PUBLIC  
 In and for the State of Texas

**TAB 17**

AFFIDAVIT IN ANY FACT

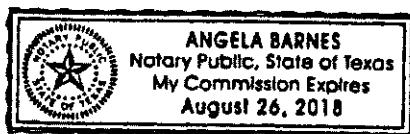
BEFORE ME, Angela Barnes, on this day personally appeared Shenice McFadden, who being by me first duly sworn, on oath deposes and says that I am competent and qualified to make the affidavit and I have personal knowledge of the fact stated herein and they are true and correct:

I believed Crystal was eligible to vote. I told Crystal to vote because I believe voting is important. I would never have encouraged Crystal to vote, if I had any doubts about her eligibility to vote. I would never have encouraged Crystal to vote, if I knew or believed that Crystal had doubts about her eligibility to vote. I firmly believe that Crystal thought she was eligible to vote.

I HAVE PERSONAL KNOWLEDGE OF THE ABOVE AND I SWEAR THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT.

Shenice McFadden  
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF April 2018



NOTARY PUBLIC  
In and for the State of Texas

TAB 18

1 right to vote. The right to serve on a jury and some  
2 other things. I do that with every one of my clients.

3 Q. So what I'm hearing from you is that you told  
4 Crystal that she didn't have the right to vote?

5 A. Yes, I -- I did share that with her. But I --  
6 Honestly, I don't think she remembered that, quite  
7 frankly.

8 Q. But you told her?

9 A. Yes.

10 Q. That's kind of relevant information to this case  
11 though, right?

12 A. It's not relevant to her defense, no.

13 Q. I'm sorry. How is that? You told her that she  
14 was not eligible to vote. She's then subsequently  
15 convicted of voting illegally. The only issue you  
16 believe to be is whether she knew or not and you told  
17 her.

18 A. Well, I -- I tell everyone that. I don't  
19 remember who remembers what. I tell every -- it's not a  
20 big lengthy conversation. I'm not sure if you practice  
21 in federal court. I'm sure you probably do. I go  
22 through the admonishments and I tell every client in  
23 state or federal court that if they're looking at a  
24 federal conviction of those certain things they would  
25 lose.

1       Q. And did you tell her how long and to what extent  
2 she'll lose the right to vote?

3       A. The only thing I tell people is I don't know how  
4 long it'll be. I do tell them that when they go to  
5 federal prison or state prison after so much time those  
6 voting rights could be restored. I didn't specifically  
7 tell her anything about voting rights during her  
8 supervised release period, no. I didn't have any contact  
9 with her at all after sentencing.

10      Q. Okay. So you told her that she would at least  
11 at some point lose the right to vote?

12      A. Well, I tell everyone that. Yes, ma'am.

13      Q. Can you agree with me that that kind of makes  
14 you a fact witness in this case?

15      A. No, it doesn't. Because we had a discussion  
16 about what she remembered. And she told me that I -- "No  
17 one had told me I have the right to vote. I didn't know  
18 I couldn't vote." And that's when I -- I said, "Do you  
19 recall the conversation we had?" She says, "No." So --

20      Q. So --

21      A. -- I'm not going to -- I'm not going to  
22 challenge her on what she remembers.

23      Q. When -- And yet you told her?

24      A. I tell everyone that, yes, ma'am.

25      Q. So when she testified that no one told her that

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Appellant's Oral Argument Handout has been served on Appellee's counsel of record via e-service on this the 9th day of September, 2019.

/s/ Thomas Buser-Clancy  
Thomas Buser-Clancy